Matter of NYC Health + Hosps. v Organization of Staff Analysts
2017 NY Slip Op 32393(U)
November 13, 2017
Supreme Court, New York County
Docket Number: 152144/2017
Judge: Erika M. Edwards
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of	Index No.: 152144/2017
NYC HEALTH + HOSPITALS,	DECISION/ORDER
Petitioner,	Motion Seq. 001 and 004
For a Judgment and Order Pursuant to Article 78 of the Civil Practice Law and Rules	
-against-	
ORGANIZATION OF STAFF ANALYSTS; THE NEW YORK CITY OFFICE OF COLLECTIVE BARGAINING; and SUSAN PANEPENTO, as Chair of the NEW YORK CITY BOARD OF COLLECTIVE BARGAINING,	
Respondents.	

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Petition, Petition and Affidavits/ Affirmations/Memos of Law annexed	1
Notice of Motion and Affidavits/Affirmations/ Memos of Law annexed	2
Notice of Cross-Motion and Affidavits/ Affirmations/Memos of Law annexed	3
Opposition/Answering Affidavits/Affirmations/ Memos of Law annexed	4
Reply Affidavits/Affirmations/Memos of Law annexed	5, 6
Amicus Curiae Brief	7
Sur-Reply Affidavits/Affirmations/Memos of Law annexed	8

ERIKA M. EDWARDS, J.:

Petitioner, NYC HEALTH + HOSPITALS ("Petitioner"), formerly known as New York City Health and Hospitals Corporation, filed this CPLR Article 78 Verified Petition against Respondents Organization of Staff Analysts ("Union"), The New York City Office of Collective Bargaining ("OCB") and Susan Panepento, as Chair of the New York City Board of Collective

Bargaining ("Panepento") under motion sequence 001. Petitioner seeks a court order vacating the decision and order, dated February 1, 2017, of the New York City Board of Certification ("The Board") granting the Union's petition requesting that Petitioner's Senior Auditor title, which included six employees, be added to their collective bargaining unit, determining that the employees are not managerial and/or confidential and that they are not precluded from being added to a collective bargaining unit. The Board rendered its decision over Petitioner's objections and after a three-day hearing was held, which included job surveys and testimony from all six employees.

Respondents OCB and Panepento now move for an order dismissing Petitioner's Petition, pursuant to CPLR 7804(f), and upholding the Board's decision under motion sequence 004. Respondent Union cross-moves for an order dismissing Petitioner's Petition, pursuant to CPLR 7804 (f), 3211(a)(1), (a)(5) and (a)(7), plus costs, fees and disbursements. Petitioner opposes both motions. The Municipal Labor Committee ("MLC"), which includes 98 New York City municipal labor organizations with 390,000 active City workers, was granted permission to appear and file an amicus curiae brief. The Petition and both motions are consolidated for purposes of decision.

For the foregoing reasons, this court denies Petitioner's Verified Petition, grants the motion and cross-motion to dismiss the Petition pursuant to CPLR 7804(f) and upholds the Board's decision to add the title Senior Auditor to the Union's collective bargaining unit, with prejudice and without costs.

Although there is a presumption that public employees have a right to be represented by a union, employees who are managerial or confidential are excluded from membership in collective bargaining units under the New York City Health and Hospitals Corporation Act, N.Y. Unconsolidated Law §§ 7381-7406, ("HHC Act" or, as referred to be Petitioner, "Enabling Act"), and the New York City Collective Bargaining Law under New York City Administrative Code § 12-305 ("NYCCBL"). The Board has the authority to determine whether certain employees are excluded from collective bargaining because they are managerial or confidential as defined by § 201.7(a) "the Taylor Law" (NYCCBL § 12-309[b][4]).

Petitioner argues in substance that the court should vacate the Board's decision because, as a matter of law, the Board incorrectly applied the narrower standard under the Taylor Law to determine that the Senior Auditor title is not managerial or confidential instead of applying the broader standard under the Enabling Act Exemption. Petitioner further argues that because such provisions are inconsistent, the Enabling Act preempts the Taylor Law and the Board was required to apply the broader standard set forth in the Enabling Act (N.Y. Unconsol. Law § 7385[11]). Petitioner further argues that the Board improperly determined that the exclusion in the Enabling Act is coextensive with the exclusion in the NYCCBL and Taylor Law. However, even under the narrower standards, Petitioner argues that they provided sufficient evidence to demonstrate that the Senior Auditor title is managerial and/or confidential and ineligible for collective bargaining. The Board incorrectly focused on limited evidence related to the process the Senior Auditors undertake rather than the majority of the evidence which proved that the substance of their work and participation in the formulation of policy makes them managerial and/or confidential. Thus, the Board's decision was arbitrary and capricious.

Respondents and/or MLC argue in substance that the Board's decision was not arbitrary and capricious and that the Board correctly found that Petitioner failed to establish that the employees are managerial and/or confidential under the NYCCBL and Taylor Law. The evidence proved that Senior Auditors do not participate in collective bargaining, personnel administration, or administration of collective bargaining agreements. They do not select what will be audited and they audit existing processes and make recommendations for how to improve them, without determining whether their recommendations will be implemented. Respondents further argue that Senior Auditors are not confidential employees even though they have access to sensitive information and they should be added to a unit with other titles with similar duties and responsibilities.

Respondents and MLC further argue that the Board has repeatedly found that the application of the Taylor Law to determine whether employees are managerial or confidential was the appropriate standard and that there is no conflict between the NYCCBL and the HHC Act. Additionally, the Board rejected similar arguments raised by Petitioner in several previous cases and Petitioner has never appealed the Board's determination. Respondents and MLC further argue in substance that if the court grants Petitioner's attempts to change the long-standing legal standard used by the Board, then such decision would reach far beyond the six Senior Auditor employees and affect eligibility determinations of all of the City's 80 collective bargaining units.

In an Article 78 proceeding, the scope of judicial review is limited to whether a governmental agency's determination was made in violation of lawful procedures, whether it was arbitrary or capricious, or whether it was affected by an error of law (*see* CPLR § 7803[3]; *Matter of Pell v Board of Educ.*, 34 NY2d 222, 230 [1974]; *Scherbyn v BOCES*, 77 N.Y.2d 753, 757-758 [1991]). In a special proceeding pursuant to 22 NYCRR §202.57, the scope of judicial review is limited to whether the Division's determination was arbitrary, capricious, or lacking a rational basis (*McFarland v New York State Div. of Human Rights*, 241 AD2d 108 [1st Dept 1998]). A determination subject to review under Article 78 exists when, first, the agency "reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be significantly ameliorated by further administrative action or by steps available to the complaining party" (*Walton v. New York State Dept. of Correctional Servs.*, 8 N.Y.3d 186, 194 [2007]).

Upon review of the Board's decision and the arguments presented, the court determines that the Board's decision was rational, thoughtful, well-reasoned and that the Board properly applied the applicable legal standard to the evidence presented at the hearing. Here, Petitioner failed to demonstrate that the Board applied the wrong legal standard or that such decision was arbitrary and capricious or contrary to the substantial evidence in the case.

The Board stated in substance that it has repeatedly found that the NYCBBL and the HHC Act are consistent in mandating that the Taylor Law provides the applicable standard to determine eligibility of employees and it relied on such precedence to apply the Taylor Law standard in this case. The Board found that Petitioner failed to establish that the employees in the Senior Auditor title are managerial and/or confidential under the NYCCBL or Taylor Law.

Therefore, the Board determined the Senior Auditor Title to be eligible for collective bargaining and added it to the collective bargaining unit.

The evidence demonstrated that the primary duty of a Senior Auditor is to conduct audits as a team leader or member of an audit team as determined by the Senior Director. They do not manage anybody. The Board evaluated the nature and scope of a Senior Auditor's duties and determined that they do not formulate policy as described in the NYCCBL and the Board's previous determinations, but merely gather and analyze data and recommend improvements to Petitioner's existing policies based on their analyses. The Board correctly discussed the difference between an employee's involvement in actually setting an agency's policy as opposed to its involvement in promulgating procedures and methods of operation for practical steps necessary to implement such policy. Additionally, the Board held that the Senior Auditors are not the type of active participants in the development of policy that the Board previously held to be ineligible for collective bargaining. Also, the Board found that they perform duties similar to other auditors and other employees who have been found to be eligible by the Board. Additionally, the Senior Auditor job description expressly sets forth that a Senior Auditor does not make management decisions or develop procedures. The Board determined that the Senior Auditors recommend improvements to existing policies based on their analyses and make non-binding recommendations to their superiors. Thus, they do not formulate policy and are not managerial.

Furthermore, the Board found that although Senior Auditors have access to confidential information and advance knowledge of personnel decisions related to their audits, Petitioner failed to demonstrate that they are confidential employees according to the definition set forth in the Taylor Law and the Board's previous decisions. Additionally, the Board found that no evidence was presented to rebut the assertion that the eligible employees share a community of interest with the bargaining unit members.

Therefore, the court finds that Petitioner failed to demonstrate that the Board's decision was arbitrary or capricious or that the Board applied the incorrect legal standard or disregarded facts or evidence presented. The court denies Petitioner's Verified Petition, grants Respondents' motion and cross-motion to dismiss the Petition and upholds the Board's decision, dated February 1, 2017, to add the title of Senior Auditor to the collective bargaining unit.

As such, it is hereby

ORDERED and **ADJUDGED** that, under motion sequence 001, the court denies Petitioner NYC HEALTH + HOSPITALS' CPLR Article 78 Verified Petition to vacate the decision and order, dated February 1, 2017, of the New York City Board of Certification determining that employees in the title Senior Auditor are eligible for collective bargaining, the court dismisses the Verified Petition against all Respondents and upholds the New York City Board of Certification's decision, dated February 1, 2017, under *OSA*, 10 OCB2d 2 (BOC 2017); and it is further

ORDERED that, under motion sequence 004, the court grants Respondents The New York City Office of Collective Bargaining's and Susan Panepento, as Chair of the New York City Board of Collective Bargaining's, motion to dismiss the Verified Petition and Respondent Organization of Staff Analysts' cross-motion to dismiss the Verified Petition and for other relief to the extent that the court dismisses the Verified Petition with prejudice and without costs.

Date: November 13, 2017

HON. ERIKA M. EDWARDS